

MEMORANDUM OF LAW

DATE: January 21, 1994

TO: Frank Hafner, Housing and Code Enforcement Deputy
Director

FROM: City Attorney

SUBJECT: Cost Recovery Strategies

You have asked whether there are any legal issues which would preclude changing a current policy related to reimbursement to the Neighborhood Code Compliance Department for code enforcement services provided to the Building Inspection Department. In short, my research suggests there is no legal bar which would preclude you from pursuing your policy objectives. However, I would caution you that any change in policy should be carefully scrutinized to ensure it can be legally implemented. You may find the following guidelines helpful.

Government Code section 66014 provides that a regulatory fee established by a local entity, such as a building permit fee, may not exceed the estimated reasonable cost of providing the service for which the fee is charged. If the fee is calculated to reimburse the local entity for a service beyond that necessary to cover the costs of the regulatory purpose sought, or if the amount of the fee is not reasonably calculated upon empirical data investigated by the local agency, the fee is susceptible to attack as a general revenue raising measure (special tax) enacted in violation of Cal. Const., art. XIII A.

For instance, last January in Opinion No. 92-506 (76 Op. Att'y Gen. (March 9, 1993)), the Attorney General concluded that it would be a violation of the state Constitution for a local agency to adopt the fee schedules set forth in tables attached to the Uniform Building Code without first performing some independent cost-benefit investigation to ascertain whether those fees reasonably reflect the cost of providing the service.

Interestingly, one of the more important cases in this area arose out of San Diego in the 1970s when the fee structure for the City's on-premises sign ordinance was legally challenged in *United Business Com. v. City of San Diego*, 91 Cal. App. 3d 156 (1979). The fee structure for the sign ordinance included a "one-time sign

inventory fee" for all existing signs, as well as a fee structure for the building permits required for various types of signs. The fees were based upon a study performed by the City in 1974 to determine the actual and estimated costs of issuing new building permits and the inspection and inventory of existing signs. The express purpose of the study was to make the fee provisions reflect the direct and indirect costs of regulation and administration of the new sign code provisions. Among other arguments, the plaintiff in the case challenged the legality of the inventory fee by attempting to characterize it as revenue generating tax rather than a properly enacted fee.

The court rejected the plaintiffs argument. The court stated:

The general rule is that a regulatory license or permit fee levied cannot exceed the sum reasonably necessary to cover the costs of the regulatory purpose sought. Such costs, however, include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement. . . .

. . . .
. . . The field study and cost analysis of the inventory process used to determine the graded fee schedule seems valid in nature, as it took into consideration the actual cost involved in the inventory and the varying amounts of time required in the field to inventory the different types of signs. . . . We find the graded fee schedule to be reasonable in character, successfully reflecting the proportionate inventory cost to the city of the inspection of each sign predicated upon its type."

United Business Com. v. City of San Diego, 91 Cal. App. 3d at 165, 167-168 (1979).

In summary, any change in cost recovery procedure must still reasonably reflect the cost of providing the service and should be consistent with the basis used to establish the fee structure in the first place. Otherwise, if the change substantially deviates from the basis used to establish the fee, it could trigger an obligation under Government Code section 66016 to hold another public hearing to justify the manner in which the fee has been calculated.

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By

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